

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

MARTIN JONATHAN BATALLA VIDAL et al.,

Plaintiffs,

-against-

16-CV-4756 (NGG) (JO)

KIRSTJEN NIELSEN, Secretary, Department of
Homeland Security, et al.,

Defendants.

STATE OF NEW YORK et al.,

Plaintiffs

-against-

17-CV-5228 (NGG) (JO)

DONALD TRUMP, President of the United States, et
al.,

Defendants.

**TRIAL BRIEF OF THE GOVERNMENT OF THE UNITED MEXICAN STATES AS
AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' MOTIONS FOR
PRELIMINARY INJUNCTION**

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ARGUMENT

I. INTRODUCTION

The Government of the United Mexican States (“Mexico”) herein expresses significant concern over the irreparable harm to its nationals, and the possible disruption that will occur to the extensive diplomatic and law enforcement collaborative relationship between the United States and Mexico, as a result of the rescission of Deferred Action for Childhood Arrivals (“DACA”).¹ Mexico files the instant brief to underscore how the public interest and the U.S. Congress’s intent is best served by granting Plaintiffs’ motions for preliminary injunction.²

As a sovereign and independent State, Mexico has a legitimate interest in promoting the well-being of its nationals who are residing in the U.S.—with over 11 million Mexican nationals, both documented and undocumented, currently living in the United States.³ Nearly 79 percent of all DACA recipients—627,666 of the 798,980 individuals who have had initial DACA applications approved—are Mexican nationals.⁴ Given these numbers, DACA’s rescission disproportionately affects Mexican beneficiaries and Mexico is compelled to act on their behalf within all its means. Mexico and the United States also engage in significant cooperation on issues

¹ See *Red Earth LLC v. United States*, 657 F.3d 138, 143 (2d Cir. 2011) (setting forth the requirement of demonstrating “irreparable harm absent injunctive relief” as a precondition to obtaining a preliminary injunction against government action).

² See *id.* (establishing the requirement of demonstrating that “that the public’s interest weighs in favor of granting an injunction.”).

³ U.S. Census Bureau, *2015 American Community Surveys (ACS)*, <https://www2.census.gov/programs-surveys/demo/tables/foreign-born/2014/cps2014/2014-year-of-entry-table2.17.xlsx> (last visited Dec. 22, 2017); see also *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941) (declaring that “[o]ne of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country’s own nationals when those nationals are in another country.”).

⁴ See U.S. Citizenship and Immigration Services, *Data Set: Form I-821D Deferred Action for Childhood Arrivals*, (Dec. 7, 2017) https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performancedata_fy2017_qtr4.pdf (last visited Dec. 22, 2017).

of immigration, drug trafficking, human trafficking, and organized crime that will be adversely affected by DACA's termination.⁵

Each nation, therefore, is strongly engaged in, and has a legitimate concern regarding, the policies of the other in connection with immigration enforcement. Mexico expressly and publicly acknowledges the sovereign right of every country to decide on the policies that should apply in their territory. It also, however, respectfully asserts its legitimate, substantial, and compelling interests to protect the rights of its nationals and to ensure that its diplomatic relations with the U.S. are not impacted by actions that may not comport with either U.S. law or international law.

II. THE RESCISSION OF DACA WOULD CAUSE IRREPARABLE HARM TO MEXICAN NATIONALS THAT WAS NOT CONSIDERED BY DEFENDANTS WHEN RESCINDING DACA

Every DACA beneficiary has a compelling personal story and has become an important part of his/her community who is performing beneficial work for the U.S. while, at the same time, enhancing the development of commercial, economic, cultural, and scientific ties between Mexico and the United States. As the New York Times recently explained, “a typical ‘Dreamer’ lives in Los Angeles, is from Mexico and came to the U.S. at 6 years old.”⁶ This brief begins by highlighting the contributions of three DACA recipients to illustrate the type of irreparable harm that will occur, and that Defendants failed to consider, when rescinding DACA.

A. Javier Alejandro Noris Guerrero

Javier Alejandro Noris Guerrero is a Mexican national who came with his parents to the United States through the southwest border without lawful immigration status when he was only

⁵ Clare Ribando Seelke and Kristin Finklea, Cong. Research Serv., *U.S.-Mexican Security Cooperation: The Mérida Initiative and Beyond*, (Jun. 29, 2017) <https://fas.org/sgp/crs/row/R41349.pdf>

⁶ Alicia Parlapiano and Karen Yourish, *A Typical ‘Dreamer’ Lives in Los Angeles, Is From Mexico and Came to the U.S. at 6 Years Old*, New York Times (Sept. 5, 2017) <https://www.nytimes.com/interactive/2017/09/05/us/politics/who-are-the-dreamers.html>

five years old.⁷ Prior to DACA, he was not able to legally work, and was exploited for below minimum wage.⁸ According to Javier “[w]hen I was working at a convenience store, I always had big aspirations, even though I wasn’t sure how they would ever come to fruition.”⁹

He had to pay his own studies, and did not receive any financial aid due to his undocumented status.¹⁰ After receiving DACA, Javier was able to receive financial aid and went to school at Cal State University, Northridge, where he studied economics and biotechnology.¹¹ According to Javier, “the moment DACA was passed, it really put everything into perspective, and I really made a conscious effort to focus on my career. So I ended up pursuing a career as a software engineer.”¹² After working as a software engineer in Silicon Valley, Javier moved to Brooklyn, New York, where he works in venture capital, running a venture fund called ScienceVest that invests in early-stage life science and frontier technology startups.¹³ These companies are working on treatments for cancer and Alzheimer’s, as well as creating technologies such as artificial intelligence, robotics, and drones that could change these industries completely.¹⁴

As a CEO of an investment fund, the repeal of DACA does not only affect Javier, it also affects the startups with which Javier works, as well as his ability to invest in them, and their ability

⁷ Jonathan Inoa, *He is an Executive, but His Future Depends Upon DACA*, NY1 News (Mar. 8, 2017), <http://www.ny1noticias.com/nyc/noticias/noticias/2017/03/8/es-un-alto-ejecutivo-pero-su-futuro-depnde-de-daca-> (last visited Dec. 22, 2017)

⁸ Suzanne Gamboa, *'Dreamers' Fear Trump Immigration Crackdown As DACA Hits 5th Anniversary*, NNC News (Jun. 15, 2017) <https://www.nbcnews.com/news/latino/dreamers-fear-trump-crackdown-daca-hits-5th-anniversary-n772451> (last visited Dec. 22, 2017)

⁹ FWD.US, *Glimpses of DACA: In their Own Words*, (Dec. 17, 2017) <https://www.fwd.us/dacastories#> (last visited Dec. 22, 2017)

¹⁰ See Inoa, *supra* note 7.

¹¹ See FWD.US, *supra* note 9.

¹² *Id.*

¹³ *Id.* See also <http://www.sciencevest.com/> (last visited Dec. 22, 2017)

¹⁴ See Inoa, *supra* note 7.

to continue to grow and employ Americans.¹⁵ Javier lives in fear and uncertainty as to what will happen to him without DACA.¹⁶ If he loses his DACA status, may be deported and investors in his company would not reap the fruits of their investments.¹⁷

Javier is one of tens of thousands of DACA recipients with STEM degrees who will be forced back into the shadows, and whose human capital and potential will be squandered, if a preliminary injunction is not granted.¹⁸

B. Cesar Adrian Vargas

Cesar Vargas is a Mexican national who came with his mother to the United States through the southwest border without lawful immigration status when he was five years old.¹⁹ Cesar grew up in Staten Island, New York and graduated from James Madison High School in Brooklyn.²⁰ He then attended St. Francis College in Brooklyn, where he received a Bachelor's degree.²¹ After law school, Mr. Vargas passed the New York State Bar Exam in 2011.²² He applied for admission to

¹⁵ See FWD.US, *supra* note 9.

¹⁶ See Inoa, *supra* note 7.

¹⁷ *Id.*

¹⁸ See Randy Capps, Michael fix, and Jie Zong, *The Education and Work Profiles of the DACA Population*, Migration Policy Institute (Aug. 2017) at p. 6. <http://www.aacrao.org/docs/default-source/TrendTopic/Immigration/download.pdf?sfvrsn=0> (last visited Dec. 22, 2017).

¹⁹ Cesar Vargas and Dan Donovan, *We didn't think we agreed on undocumented immigration. We were wrong*, Washington Post (Mar. 13, 2017), https://www.washingtonpost.com/posteverything/wp/2017/03/13/we-didnt-think-we-agreed-on-undocumented-immigration-we-were-wrong/?utm_term=.8ddea50b22d4 (last visited Dec. 22, 2017).

²⁰ Liz Robins, *An Immigrant's Four-Year Fight to Become a Lawyer Ends in Celebrations*, New York Times (Feb. 3, 2016), <https://www.nytimes.com/2016/02/04/nyregion/immigrants-4-year-legal-fight-to-become-a-lawyer-ends-in-celebration.html> (last visited Dec. 22, 2017).

²¹ Daniel Wiessner, *N.Y. court grants law license to undocumented immigrant*, Reuters (June 4, 2015), <https://www.reuters.com/article/us-new-york-immigrant/n-y-court-grants-law-license-to-undocumented-immigrant-idUSKBN0OK1YY20150604> (last visited Dec. 22, 2017).

²² See Robins, *supra* note 19.

the bar in 2012, but was denied because of his undocumented status.²³ His application was then referred to the Appellate Division of State Supreme Court.²⁴

In February 2013, Cesar was able to obtain lawful employment authorization through DACA.²⁵ His law license was ultimately granted on the ground that concerns about his undocumented status had been “ameliorated by the implementation of the DACA policy and, as to Mr. Vargas individually, by DHS’s USCIS grant of his DACA application and the renewal thereof.”²⁶ In his short time as an attorney, Cesar has already been able to help undocumented teens to obtain *pro bono* representation and, ultimately, relief from removal.²⁷ His unique background as a DACA recipient has made it easier for his clients to share their difficult stories with him in the process of obtaining legal assistance.²⁸

Termination of DACA will irreparably harm Cesar, his clients who might not be able to receive any other legal assistance, and the many other attorneys with DACA relief whose immigration status, livelihood, and client interests will suffer unless Plaintiffs’ motion for preliminary injunction is granted.²⁹

²³ *Id.*

²⁴ *Id.*

²⁵ *Matter of Vargas*, 131 A.D.3d 4, 10 N.Y.S.3d 579 (2015).

²⁶ *Id.* at 15.

²⁷ Rebecca Klein, *An Undocumented Teen Gains Asylum With The Help Of His Undocumented Lawyer*, Huffington Post (July 22, 2017), https://www.huffingtonpost.com/entry/cesar-vargas-undocumented-lawyer-client_us_59727244e4b09e5f6ccf6cf6. (last visited Dec. 22, 2017).

²⁸ See Safe Passage Project, *Cesar Vargas, Safe Passage Attorney of the Month* (Sept. 6, 2017) available at <https://www.safepassageproject.org/2017/09/cesar-vargas-safe-passage-attorney-of-the-month/> (last visited Dec. 22, 2017).

²⁹ See Jennifer Medina, *A Defender of the Constitution, With No Legal Right to Live Here*, New York Times (July 17, 2017) <https://www.nytimes.com/2017/07/17/us/undocumented-immigrants-illegal-citizenship.html?mtrref=www.google.com> (last visited Dec. 22, 2017).

C. Julio Ramos

Julio Ramos is a Mexican national who came to the U.S. with his family and grew up in south Texas without lawful immigration status.³⁰ At the age of 12, his mother was diagnosed with stage 3 breast cancer, and this experience motivated him to pursue a career as a doctor.³¹ For several years, he worked as a middle school biology teacher in Brownsville, Texas.³² Julio applied to medical schools in 2014 and 2016, and was accepted, but was unable to matriculate due to his undocumented status.³³ Finally, in 2016, Julio was admitted into both the Stritch School of Medicine at Loyola University in Chicago and the Icahn School of Medicine at Mount Sinai in New York City, two of the few medical schools in the nation that allow undocumented students with DACA relief to attend.³⁴ Julio now attends the Icahn School of Medicine, which awarded him a combination of loans and scholarships to pay for his medical education.³⁵

Like many DACA recipients, Julio's unique background has allowed him to serve as a cultural bridge to improve relations between the United States and Mexico. As Julio describes it, "[d]ue to my experiences, I am empathetic to the obstacles people face in accessing healthcare,

³⁰ New York Times Editorial Board, *American Dreamers*, New York Times (Jan. 3, 2017) <https://www.nytimes.com/interactive/projects/storywall/american-dreamers/stories/julio-ramos> (last visited Dec. 22, 2017).

³¹ *Id.*

³² Reynaldo Leanos Jr., *In the age of Trump, fewer lenders want to provide this med student with student loans*, Public Radio International (May 17, 2017) <https://www.pri.org/stories/2017-05-17/age-trump-fewer-lenders-want-provide-med-student-student-loans> (last visited Dec. 22, 2017).

³³ See New York Times Editorial Board, *supra* note 29.

³⁴ See Leanos Jr., *supra* note 28; Reynaldo Leanos Jr., *Halfway through med school, undocumented students worry Trump will derail their progress*, Public Radio International (Dec. 27, 2016) <https://www.pri.org/stories/2016-12-27/halfway-through-med-school-undocumented-students-worry-trump-will-derail-their> (last visited Dec. 22, 2017).

³⁵ *Id.*

and this fuels my goal of providing care to those that are uninsured. I believe I can transform communities through medicine, but only if DACA continues.”³⁶

Defendants’ rescission of DACA will irreparably harm Julio Ramos. In addition to placing him at imminent risk of removal, if Julio loses his employment authorization, it will become incredibly difficult, if not impossible, for him pay back the student loans he was already given to attend medical school.³⁷ In addition, if Julio is not able to have work authorization by the time medical school ends, it is unclear whether he would be allowed to join a residency program to complete his training. Julio’s situation is not unique. He is actually one of an estimated 70 DACA recipients currently studying at medical schools in the United States.³⁸ The rescission of DACA would represent a significant loss of the educational resources that the United States has already expended to train these talented future physicians to serve the American public.

D. Defendants’ DACA Rescission Memo Irreparably Harms all DACA Recipients by Exposing them to the Risk of Imminent Removal Regardless of the Length of their Remaining DACA Approval Period

Even if a substantial number of DACA recipients may not officially lose their DACA benefits for several months or even longer, Defendants’ actions to terminate DACA have caused a *de facto* instantaneous termination of DACA’s protections for all of its beneficiaries. The protections offered by DACA have now become illusory in a world where the overall program has been terminated and an increasing number of DACA beneficiaries are seeing their benefits revoked without due process based solely upon arrests that might occur for any reason whatsoever,

³⁶ See New York Times Editorial Board, *supra* note 29.

³⁷ Angilee Shah, Reynaldo Leanos Jr., et al., *DACA recipients won’t go back into the shadows quietly*, Public Radio International (Sep. 5, 2017) <https://www.pri.org/stories/2017-08-30/daca-recipients-won-t-go-back-shadows-quietly> (last visited Dec. 22, 2017).

³⁸ Mallika Kallingal and Michelle Krupa, *She's undocumented and in med school. Now what?*, CNN (Mar. 16, 2017) <http://www.cnn.com/2017/03/15/health/undocumented-medical-students-trump-trnd/index.html> (last visited Dec. 22, 2017).

including unlawful reasons such as racial profiling.³⁹ States and localities are passing laws such as Texas's SB 4 law⁴⁰ that promote the removal of individuals who are arrested by local law enforcement for any reason. And Defendants are actively promoting and encouraging more states and localities to pass laws such as SB 4.⁴¹ Defendants' recent decisions and memoranda on immigration enforcement indicate that all undocumented individuals are now a priority for removal. With DACA's rescission, the undocumented population has become a target for arrests and likely removal. Mexico is therefore concerned that its nationals and individuals of Latino appearance will experience an enhanced risk of state-sanctioned acts of bias, discrimination, and detention that did not exist prior to DACA's rescission. Arrests and detentions will likely arise based on the mere appearance of the person that fits the typical profile of a DACA beneficiary⁴² who encounters police, constituting a clear form of discrimination. The Supreme Court has stated that race, ethnic appearance, and language are not reliable indicators of alienage.⁴³ Plaintiffs'

³⁹ See U.S. Citizenship and Immigration Services, *DACA Terminations Related to Criminal and Gang Activity by Fiscal Year*, (Dec. 7, 2017) https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA_Terminations_Related_to_Criminal_and_Gang_Activity_by_Fiscal_Year.pdf (last visited Dec. 22, 2017); see also Nicole Rodriguez, *Trump Administration has Illegally Attempted to Deport DACA Recipients*, *Advocates Say*, Newsweek (Dec. 2, 2017) <http://www.newsweek.com/trump-administration-has-made-illegal-attempts-deport-daca-recipients-724842> (last visited Dec. 22, 2017).

⁴⁰ See Tex. Gov't Code §§ 752.051, 752.052, 752.053, 752.056, 752.0565, 772.0073 (2017).

⁴¹ Will Weissert, *Homeland Security chief lauds Texas 'sanctuary cities' ban*, Associated Press (Dec. 14, 2017) <http://www.chicagotribune.com/sns-bc-us--sanctuary-cities-texas-20171213-story.html> (last visited Dec. 22, 2017).

⁴² Julian Aguilar, *Congressman raises questions after DACA recipients were detained at checkpoint*, Texas Tribune (Sept. 13, 2017) <https://www.texastribune.org/2017/09/13/us-rep-gonzalez-wants-answers-after-daca-recipients-were-detained-chec/> (last visited Dec. 22, 2017).

⁴³ See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873, 886 (1975) ("Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small portion of them are aliens").

motions for preliminary injunction should be granted to prevent the irreparable harm that will likely be caused by the increased racial profiling of current DACA recipients.

III. THE PUBLIC INTEREST WEIGHS STRONGLY IN FAVOR OF GRANTING PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION INsofar AS DACA IS CRITICAL TO ACHIEVING CONGRESS'S INTENT IN ENACTING NAFTA AND MAINTAINING OPTIMAL FOREIGN RELATIONS BETWEEN MEXICO AND THE UNITED STATES

A. Congress has Clearly Spoken and Expressed its Unambiguous Intent to Allow Mexican Nationals with the Exact Same Education and Skills as DACA Recipients to Live, Study, and Work in the United States

As indicated above, many DACA recipients (including all of the individuals discussed in this brief) have received degrees from U.S. universities and are performing critical highly-skilled tasks as part of their employment.⁴⁴ DACA has been enormously successful in encouraging what was once the most vulnerable group of undocumented immigrants to fully participate and express themselves within American society. A critical point that is often overlooked in the DACA discussion is that, prior to the creation of DACA, Congress had already clearly and explicitly given its approval to providing any and all qualified Mexican nationals the ability to study at U.S. universities and to obtain highly-skilled employment in the U.S. without any caps or limitations on the number of Mexican nationals studying or working in the United States.

As an initial matter, Congress has explicitly stated in INA Section 101(a)(15)(F) that Mexican nationals who are accepted at U.S. colleges and universities can obtain student visas to attend these schools. Indeed, in FY 2015, 237,248 Mexican nationals were admitted into the U.S. on student visas, and 96,401 Mexican nationals were admitted into the U.S. on F-3 nonimmigrant

⁴⁴ See Randy Capps, Michael fix, and Jie Zong, *The Education and Work Profiles of the DACA Population*, Migration Policy Institute (August 2017) at p. 6. <http://www.aacrao.org/docs/default-source/TrendTopic/Immigration/download.pdf?sfvrsn=0>

status, which allows Mexican nationals to continue to reside in Mexico while commuting to the U.S. to attend school.⁴⁵

Moreover, after a Mexican national successfully graduates from a U.S. university (or even a university in Mexico), they are able to engage in highly skilled employment in the United States using several visa categories, including the H-1B visa, the L-1 visa, and the optional practical training component of the student visa.⁴⁶ And in addition to these visas that are available to foreign nationals from all over the world, Mexican nationals are given an additional visa that allows them to work in the U.S. under what is known as the TN nonimmigrant classification, which was created following Congressional approval of the North American Free Trade Agreement (NAFTA) on December 8, 1993.⁴⁷ There are no caps on the number of TN visas that can be issued,⁴⁸ and Mexican nationals can work on TN visas in three year increments and bring their spouses and children with them as well.⁴⁹ There are currently sixty-three permissible occupations for TN visas that are listed in Appendix 1603.D.1 to Annex 1603 of NAFTA.⁵⁰ Consequently, for the large percentage of DACA recipients that are Mexican nationals, Congress has already clearly envisioned a scenario whereby those individuals could study, live, and work in the United States.

⁴⁵ See U.S. Dep't of Homeland Security, *U.S. Nonimmigrant Admissions*, <https://www.dhs.gov/sites/default/files/publications/YRBK%202015%20NI%20Excel%20Supp%20Final%200.zip>.

⁴⁶ See 8 U.S.C. § 1101(a)(15)(H)(i)(b); 8 U.S.C. § 1101(a)(15)(L); and 8 C.F.R. § 214.2(f)(10)

⁴⁷ INA Section 214(e); 8 U.S.C. § 1184(e); *see also* U.S. Citizenship and Immigration Services, *NAFTA Professional Workers from Canada or Mexico*, <https://www.uscis.gov/archive/archive-news/nafta-professional-workers-canada-or-mexico>

⁴⁸ See *id.* (stating that “There is no annual limit on the number of TN admissions to the United States.”)

⁴⁹ *Id.*

⁵⁰ See North American Free Trade Agreement, 32 I.L.M. 289 (1993), Appendix 1603. D.1 to Annex 1603

Defendants' actions, however, seek to arbitrarily and capriciously target DACA beneficiaries for punishment based solely on the actions of their parents. As stated above, Mexican nationals who are accepted at any U.S. college or university can readily obtain student visas to attend school in the United States. A DACA recipient, however, is senselessly unable to fix their unauthorized status by obtaining a student visa to study at a U.S. university because the student visa statute explicitly requires foreign nationals to have "a residence in a foreign country which he has no intention of abandoning."⁵¹ By definition, a DACA recipient cannot meet that statutory criteria because the DACA memo stated that recipients must have "continuously resided in the United States" since June 15, 2007.⁵² Therefore, even though the Congress placed no cap on the number of Mexican nationals who can obtain student visas to attend U.S. universities, DACA recipients are being punished and prevented from obtaining student visas solely because they were brought to live in the United States through no fault of their own at a very young age.

Similarly, any Mexican national with a college degree from either Mexico or the United States can work in the United States on a TN-visa in one of sixty-three skilled occupations. But again, a DACA recipient, cannot obtain a TN-visa because they will be deemed inadmissible under Section 212(a)(9)(B) of the Immigration and Nationality Act as an alien who "has been unlawfully present in the United States for one year or more."⁵³ By definition, any DACA recipient has to have been physically present in the United States on June 15, 2012 and have had no lawful status at the time (hence making the universe of individuals with DACA status almost entirely populated

⁵¹ See INA Section 101(a)(15)(F); 8 U.S.C. § 1101(a)(15)(F).

⁵² Mem. from Janet Napolitano, Sec'y of Homeland Security, to Alejandro Mayorkas, Dir., U.S. Citizenship and Immigration Servs., Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children, June 15, 2012

⁵³ See INA Section 212(a)(9)(B)(II); 8 U.S.C. § 1182(a)(9)(B)(II).

by people who are affected by what is known as the “10-year-bar” of inadmissibility).⁵⁴ Therefore, the only way a DACA recipient could ever obtain a TN-visa is to return to Mexico for 10 years and then apply for a TN-visa after the 10 years have elapsed (meaning that the individual would have to voluntarily submit to a 10-year banishment to atone for the actions of their parents).⁵⁵

The purpose for creating the TN visa as part of NAFTA was to “reflect[] the preferential trading relationship between the Parties.”⁵⁶ NAFTA itself was designed to “strengthen the special bonds of friendship and cooperation,” between Mexico, the United States, and Canada.⁵⁷ Similarly, the DACA program allows young and talented Mexican nationals to serve as spokespersons and ambassadors for mutual understanding between the U.S. and Mexico. Consequently, preventing DACA recipients from engaging in the exact conduct that Congress specifically authorized in the student visa, work visa, and TN visa statutes solely serves to unfairly penalize DACA recipients for the actions of their parents.

Even though Congress explicitly created programs for skilled Mexican nationals to be able to study at U.S. universities and work in the United States, Defendants’ actions are arbitrarily and capriciously precluding DACA recipients from fulfilling Congress’s intentions. This is contrary to the Supreme Court’s repeated pronouncement that “[V]isiting ... condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the ... child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual

⁵⁴ See Mem. from Janet Napolitano, *supra* note 60.

⁵⁵ The “10-year-bar” contained in Section 212(a)(9)(B)(II) of the INA is also another reason DACA recipients cannot obtain a student visa.

⁵⁶ North American Free Trade Agreement, Article 1601, *available at* <https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement?mvid=1&secid=8fd98e3e-4495-43a8-ba47-4a6955d6b5db#A1601>

⁵⁷ North American Free Trade Agreement, Preamble, *available at* <https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement?mvid=1&secid=b5b817ee-c48a-4dda-b8d9-c4564e34ac4b>

responsibility or wrongdoing.”⁵⁸ The rescission of DACA also violates the Fifth Amendment’s equal protection clause because there is no rational basis for excluding DACA recipients from the immigration outcomes available to similarly situated Mexican nationals. And it is also a violation of DACA beneficiaries’ substantive due process rights to place their liberty at risk on the basis of their parents’ conduct. Therefore, to the extent that most DACA recipients are Mexican nationals and that many DACA recipients are simply seeking to engage in occupations that are already covered by the TN visa or other visa programs, the public interest favors granting Plaintiffs’ motions for preliminary injunction because it simply places Plaintiffs in the same position that Congress had already contemplated they would be in but for their parents’ actions.

B. Defendants’ DACA Rescission Memo Harms the Public Interest by Generating Fear and Uncertainty Amongst DACA Recipients and their Families, both in the United States and Mexico, and by Straining Mexico’s Available Consular Resources

The Government of Mexico has fifty consulates in the United States⁵⁹ all charged with performing duties such as helping Mexican citizens living or traveling in the U.S. who need assistance when dealing with U.S. laws and legal issues, or who need vital documents such as passports, identifications and birth certificates.⁶⁰ Consular services include the following functions contained in Article 5 of the Vienna Convention: (a) protecting the interests of Mexican nationals; (b) furthering the development of commercial, economic, cultural and scientific relations between Mexico and the United States; (c) issuing passports and travel documents to Mexican nationals (d)

⁵⁸ *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)).

⁵⁹ See Press Release, *5th State of the Union Address: Mexico with Global Responsibility* (Sept. 2, 2017) <https://www.gob.mx/presidencia/articulos/5thstate-of-the-union-address-mexico-with-global-responsibility?idiom=en> (last visited Dec. 22, 2017).

⁶⁰ See Government of Mexico, *Here is What Your Consulate Does for You* https://www.gob.mx/cms/uploads/attachment/file/211586/Here_is_what_your_Consulate_does_for_you.pdf (last visited Dec. 22, 2017).

assisting Mexican nationals; (e) acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature; (f) safeguarding the interests of Mexican minors and other persons lacking full capacity; and (g) representing or arranging appropriate representation for Mexican nationals before state and local tribunals and other authorities, for the purpose of obtaining, in accordance with the laws and regulations, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defense of their rights and interests. Consular officials also strengthen relations with local authorities, as well as business and community organizations in the region, and serve to promote Mexico as a country of economic, touristic, gastronomic, scientific, academic, cultural and artistic interest.

Based on Mexico's consultations with its consular officials stationed across the United States and in New York, it is undeniable that Defendants' DACA rescission memo is creating fear, panic, and uncertainty⁶¹ among Mexican nationals both nationwide and in New York regardless of immigration status, as well as among Mexicans visiting the U.S. for both business and leisure travel.⁶² This widespread concern is causing a disproportionate share of the time and resources of Mexican consular officials to be focused on addressing the immigration enforcement concerns of

⁶¹ See Mexican Embassy in Washington, *Press Release Related to the announcement of the decision of rescinding DACA*, (Sept. 5, 2017)

<https://embamex.sre.gob.mx/eua/index.php/en/press-releases/press-releases-2017/1386-the-government-of-mexico-deeply-regrets-the-cancellation-of-the-deferred-action-for-childhood-arrivals-program-daca?platform=hootsuite> (last visited Dec. 22, 2017).

⁶² National Public Radio, *Discrimination in America: Experiences and Views of Latinos*, (Oct. 2017) "In contrast, the share of Mexicans who say they would work and live in the U.S. *without authorization* has decreased from 20% two years ago to 13% now. At the start of his presidential campaign in June 2015, Trump announced his plans to build a wall on the U.S.-Mexico border, and he has continued to push for stricter immigration policies since then."

<https://www.npr.org/documents/2017/oct/discrimination-latinos-final.pdf>

<http://www.latinodecisions.com/blog/2017/03/07/perceptions-of-anti-immigrant-policy-and-health-outcomes/>

Mexican nationals as opposed to the focus in prior years on promoting commercial, economic, cultural, and scientific relations between Mexico and the United States.⁶³ The Government of Mexico keeps statistics of the consular services it provides, including the number of travel and other documents issued to Mexican nationals and the number of people seeking assistance from the consulates. In addition, the Government of Mexico also operates the call center “*Centro de Información y Asistencia a Mexicanos*” (hereinafter CIAM) to inform Mexican nationals about the protection services provided by the Consulates along with other topics of interest concerning their rights in the United States.⁶⁴ Beginning on September 5, 2017, the date of Defendants’ DACA rescission memo, CIAM has registered almost a 3000% increase in the number of calls from Mexican nationals per month when compared to past months.⁶⁵ This increase in calls is caused, among other issues, by the fear and uncertainty that Mexican nationals with DACA status have of being apprehended and removed.

Because Mexico must expend significant consular resources to respond to the widespread fear and anxiety created by the rescission of DACA, the diplomatic relationship between Mexico and the U.S. is being improperly strained. In weighing the public interest factors as required under *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008), Mexico respectfully submits that the likely strain caused to Mexican-U.S. relations by the rescission of DACA outweighs any harm that Defendants would suffer if the preliminary injunction is granted. Granting a preliminary injunction would simply preserve the status quo that has been in place for years. The federal government would

⁶³ *See Id.*

⁶⁴ *See* Consulate General of Mexico in New York, *Statement by the Consulate General of Mexico in New York regarding the impact of DACA’s rescission among the Mexican community in the United States*, (Dec. 2017) <https://consulmex2.sre.gob.mx/nuevayork/index.php/espanol/aviso-a-la-comunidad/1086-comunicado> (last visited Dec. 22, 2017).

⁶⁵ *See Id.*

maintain the ability to enforce federal immigration law and remove any DACA recipient that engages in a criminal act or otherwise violates the terms and conditions of DACA.

C. Defendants' DACA Rescission Memo Harms the Public Interest by Undermining the Credibility of U.S. Promises to Foreign Nationals Regarding Immigration which Incentivizes Undocumented Immigration and Unnecessarily Overwhelms all Available Mexican Immigration Enforcement Resources

When nearly 800,000 young adults applied for relief under DACA, they did so based on the commitment given to them by the U.S. government that their personal information would not be used for immigration enforcement purposes.⁶⁶ Now, the Trump Administration has stated that it cannot guarantee that DACA application information will not be used for immigration enforcement purposes.⁶⁷ When the United States does not live up to its immigration commitments, this undermines the credibility of the entire U.S. legal immigration system and encourages foreign nationals to enter the United States without authorization and remain in the shadows for fear that disclosing their presence to immigration officials will only lead to imminent removal. As a result of the U.S.'s failure to live up to its immigration commitments, Mexico is compelled to use its immigration enforcement resources to manage transit flows of migrants who would otherwise have waited at home and attempted to immigrate legally⁶⁸, at the same time more Mexican nationals could be removed after losing their deferred action. This undermines the public interest by making it more difficult to combat undocumented immigration than would otherwise have been the case had the DACA memo not been rescinded. Therefore, even though it may initially seem

⁶⁶ See (Doc. 113-1) at pp. 28-33.

⁶⁷ Maryalice Parks, Geneva Sands, and Serena Marshall, *Homeland security does little to ease nervous DACA recipients*, ABC News (Sept. 28, 2017), <http://abcnews.go.com/US/homeland-security-ease-nervous-daca-recipients/story?id=50153287> (last visited Dec. 22, 2017).

⁶⁸ See Seelke and Finklea, *supra* note 4.

counterintuitive, it should actually come as no surprise that unauthorized immigration has significantly increased since the date of Defendants' DACA rescission announcement.⁶⁹

D. Defendants' DACA Rescission Memo Harms the Public Interest by Undermining U.S. International Law Commitments and Thwarting the Positive Cross-Border Cultural Exchanges that were Previously Occurring Prior to the Termination of DACA

The final area in which Defendants' rescission of DACA has harmed the public interest has been in the undermining of U.S. obligations under international law. On October 11, 2017, the Inter-American Commission on Human Rights (IACHR) expressed its deep concern regarding the termination of DACA based on the fact it will "jeopardize [DACA recipients'] ability in practice to ensure equal access to economic and social rights—including education, labor protections, and healthcare—and legal guarantees, such as access to the courts."⁷⁰ The specific rights that the IACHR is most concerned about involve Articles II, XVII, and XXV of the American Declaration of the Rights and Duties of Man,⁷¹ as immigrant communities are reporting far fewer crimes due to fear that contact with police will lead to deportation.⁷²

⁶⁹ See U.S. Customs and Border Protection, *Southwest Border Migration FY2018*, <https://www.cbp.gov/newsroom/stats/sw-border-migration> (stating that "CBP has seen an uptick in individuals month-to-month apprehended while trying to enter the country illegally in between the established ports of entry . . . [with] the largest percentage increases com[ing] from family units and unaccompanied children who increased 45 percent and 26 percent respectively compared with the previous month.")

⁷⁰ Inter-American Commission on Human Rights, *Press Release: IACHR Expresses Deep Concern for the Decision to End the Deferred Action for Childhood Arrivals (DACA) and Other Legal Avenues for Migrants and Refugees in the United States*, (Oct. 11, 2017) http://www.oas.org/en/iachr/media_center/PReleases/2017/155.asp

⁷¹ Inter-American Commission on Human Rights (IACHR), American Declaration of the Rights and Duties of Man, 2 May 1948, *available at*: <http://www.refworld.org/docid/3ae6b3710.html> [accessed 22 December 2017]

⁷² Rob Arthur, *Latinos In Three Cities Are Reporting Fewer Crimes Since Trump Took Office*, FiveThirtyEight (May 18, 2017) <https://fivethirtyeight.com/features/latinos-report-fewer-crimes-in-three-cities-amid-fears-of-deportation/> (last visited Dec. 22, 2017).

Moreover, the termination of DACA undermines U.S. commitments under Article 23 of the International Covenant on Civil and Political Rights (“ICCPR”), which states that the family “is entitled to protection by society and the State.”⁷³ DACA’s rescission threatens this principle as beneficiaries will be prevented from living with U.S. citizen immediate relatives. In many families, the DACA recipient is the main breadwinner and ending DACA causes entire families to suffer, including mixed-status families that contain U.S. citizens in the household.⁷⁴

The ending of DACA is also in tension with Article 12 of the ICCPR, which declares that “no one shall be arbitrarily deprived of the right to enter his own country,” and Article 24 of the ICCPR which states that “[e]very child has the right to acquire a nationality.”⁷⁵ Many DACA recipients pledge allegiance to the United States on a daily basis, are unable to recall any other country that they ever lived in, and are even unfamiliar with the language, culture, and institutions of their country of birth. Many of these individuals lack a safety net in their country of birth because their presence was not registered there prior to their departure. DACA allowed the most vulnerable group of undocumented immigrants to fully exercise various fundamental rights that they previously could not fully exercise (education, work, security, etc.). The cancellation of the

⁷³ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Art. 23(1), available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 21 December 2017] (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”)

⁷⁴ Anna Maria Barry-Jester, *The End Of DACA Will Ripple Through Families And Communities*, Fivethirtyeight.com (Sept. 6, 2017) <https://fivethirtyeight.com/features/the-end-of-daca-will-ripple-through-families-and-communities/> (last visited Dec. 22, 2017). (“Because of the parameters of who is allowed into the program, DACA participants often are in the early stages of their careers and are frequently breadwinners for families that can include young children as well as older parents and grandparents.”)

⁷⁵ See *supra* note 73 at Art. 12(4), 24(3).

program places beneficiaries in a situation that prevents them from fully enjoying these human rights. This regression of rights is a *per se* violation of their fundamental rights.

When the United States does not act as the moral leader of the world in terms of living up to the highest ideals and spirit of its international commitments, it undermines its moral authority to persuade other countries to live up to their commitments. Consequently, granting Plaintiffs' motions for preliminary injunction would serve the public interest by enabling the United States to restore its moral clarity regarding its treatment of its most vulnerable noncitizen population.

Granting Plaintiffs' motions for preliminary injunction would also enhance the public interest by enabling the Government of Mexico to promote cultural and educational ties with DACA recipients that enhance the relationship between Mexico and the United States. Mexico actively engages in substantial cultural programming both in the U.S. and Mexico to promote positive dialogue between Mexicans and Americans.⁷⁶ The rescission of DACA will frustrate the efforts of the Mexican Government to re-encounter and link with the young Mexican diaspora and to contribute to their full development for the benefit of both Mexican and American societies given that DACA recipients will no longer be able to freely live and work in the United States. Restoring the DACA program will allow these young persons of Mexican heritage to serve as cultural ambassadors and to promote the values of diversity, tolerance, and cultural understanding throughout the United States as Americans begin to see successful people in all fields and occupations from Mexico and other Latin American countries.

⁷⁶ See The U.S.- Mexico Foundation's Dreamers Without Borders (DWB) program is the most prestigious binational educational and service program specially designed for young DACA dreamers <https://www.usmexicofound.org/programs/daca-dreamers-delegations-to-mexico/>

CONCLUSION

Due to irreparable harm that will be inflicted upon current DACA recipients and the possible disruption that might occur to the diplomatic relationship between the United States and Mexico if DACA is rescinded, the Government of Mexico respectfully asks the Court to grant Plaintiffs' motions for preliminary injunction and enjoin the termination of DACA pending further proceedings.

Dated: December 22, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on December 22, 2017, I electronically filed a copy of the foregoing Brief Amici Curiae using the CM/ECF System for the United States District Court of Appeals for the Eastern District of New York, which will send notification of that filing to all counsel of record in this litigation.

Dated: December 22, 2017

/s/Howard Sokol
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